UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

WYMAN GORDON TRU-FORM, LLC,
Employer,

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC,
Union.

Case Nos. 04-CA-182126
04-CA-186281
04-CA-188990

WILLIAM BERLEW'S POST-HEARING BRIEF

INTRODUCTION[1]

In November 2016, Wyman Gordon Tru-Form ("Wyman") withdrew recognition from the United Steel Workers ("Union" or "USW") upon receiving a decertification petition signed by the majority of its employees. Proposed Intervenor William Berlew ("Berlew") was one of the primary circulators of that petition and was one of the driving forces behind the employee effort to rid his workplace of the USW. He and other employees possessed continuing and longstanding opposition to the USW's representation, dating back to its original organizing campaign.

The key question in this case is whether Wyman's alleged unfair labor practices tainted the employees' decertification petition and Wyman's subsequent withdrawal of recognition, thus necessitating the forced return of the Union with a Board-imposed bargaining order. According

[1] Proposed Intervenor William Berlew files this brief in accordance with the ALJ's March 14, Order granting partial intervention solely for purposes of filing a brief. Nevertheless, Berlew maintains that his full intervention as a party was improperly denied, and he reserves the right to file exceptions to the Board and make all such arguments before the Board if exceptions are necessary.

to the General Counsel's allegations, taint can be found or inferred because Wyman illegally prolonged bargaining, made two unilateral changes, and maintained an illegal provision in an employee handbook.

Of these gossamer claims, the only one that could have even the slightest logical connection to tainting the employees' petition[2] is the General Counsel's claim that Wyman failed to unilaterally increase wages in August 2016.

In past years, Wyman often gave employees a discretionary raise in August, but avoided the use of any particular criteria to determine the amount of the increase. Wyman determined that amount by "sticking their finger up in the wind" (Tr. 676:1). Long-settled authority precludes any claim here that Wyman made an illegal unilateral change by not granting a wage increase because timing alone is "a characteristic found insufficient to create a term or condition of employment." *Arc Bridges, Inc. v. NLRB*, 662 F.3d 1235, 1239 (D.C. Cir. 2011) (citing *Daily News v. NLRB*, 73 F.3d 406, 412 n.3 (D.C. Cir. 1996)). A yearly wage increase can become a condition of employment only when the employer has established "objective criteria for determining" the amount of the wage increase. *Arc Bridges*, 662 F.3d at 1239; *see also United Rentals* 349 NLRB 853 (2007) (holding whether an employer used fixed criteria is a factor in determining whether a wage increase program constituted a term and condition of employment).

[2] Berlew does not address (other than a brief discussion of the discretionary wage increase) whether the General Counsel's allegations were meritorious as unfair labor practices so as not to duplicate Wyman's brief. To conserve the ALJ's time, he simply addresses whether the employees' petition was adequately verified and if the alleged unfair labor practices could possibly have tainted the petition. *See, e.g., Tenneco Auto., Inc. v. NLRB*, 716 F.3d 640, 643–44 (D.C. Cir. 2013) ("On the record before the court, there is no substantial evidence that the Company's unfair labor practices 'significantly contribute[d]' to the employees' petition for decertification."). Berlew does not concede that Wyman committed any unfair labor practices and adopts Wyman's brief on these points.

Because Wyman had no fixed criteria for determining the amount of the increase—other than its own complete discretion—the yearly wage increases were purely discretionary and could be discontinued without bargaining. *Arc Bridges*, 662 F.3d at 1239. Indeed, it would have been flatly unlawful for Wyman to have increased the wages of employees because doing so would have been a unilateral change. *State Farm Mut. Auto Ins. Co.*, 195 NLRB 871, 889-90 (1972).

Still, the General Counsel's theory proffered at trial is that "[Wyman] had a duty to inform the Union of the [lack of an] interim wage increase . . . and to bargain over the amount of the wage increase before August 1." (Tr. 23-24:23-2). The General Counsel's theory seems to be twofold: (1) Wyman made a unilateral change in the terms of conditions of employment after August 1 without bargaining; and (2) Wyman had a duty to bargain the wage increases prior to August 1 and because it did not, it created employee dissention that undermined the Union.

The General Counsel's claims that this (and other actions) tainted Berlew's petition rests on thin reeds that cannot withstand scrutiny. Taken as a whole, the record evidence demonstrates that the unfair labor practices had no connection to the organization or signing of the decertification petition. To the contrary, this bargaining unit, from the onset, was divided between pro and anti-Union employees. The General Counsel's premise that the employees long opposed to the Union *ab initio* really wanted the Union to continue to represent them—if only Wyman had not coerced them—is preposterous. There is less than scant evidence that the employees' dissatisfaction with the Union was caused by anything Wyman did or failed to do. Taken as a whole, it appears more likely that the Union lost majority support because the bargaining unit was already highly divided and suffered from an attrition of pro-union employees. For these reasons, the Complaint should be dismissed.

STATEMENT OF THE FACTS

A. Background and bargaining

1. On May 21, 2014 the Union won an election at Wyman by the narrowest of margins, a vote of 24-22. After the Union was certified in 2015, Rick Grimaldi, Wyman's attorney and lead negotiator, attempted to reach out to Union representative Joe Pozza to begin negotiations. Grimaldi proposed bargaining dates beginning in August 2015 (and may have proposed meeting sooner). (Tr. 704:16-20) (Wyman Ex. 4). He was rebuffed and told the Union could not commence negotiations until the fall of 2015. (Tr. 615-16).

By the fall of 2015, employee morale towards the Union was low, especially given the narrow margin of victory in the election. Union President and bargaining committee member Brian Callora testified that when the Union held its first meeting in the fall of 2015 (18-months after its election victory), only 12 employees showed up. (Tr. 81:1-8). Callora testified he was "pleasantly surprised" by even that paltry turnout. (Tr. 101:14-15). After this single meeting, the Union did not hold a second employee meeting until the fall of 2016. (Tr. 81:1-8). It did not bother to send out bargaining updates to the represented employees until August 3, 2016, after the parties had met to bargain *thirteen times* for close to a year. (G.C. Ex. 6).

In September 2015, the parties finally met to negotiate a first contract. The parties met in 25 negotiating sessions over the next year, and reached several tentative agreements. (Wyman Ex. 63). Grimaldi testified that the sessions between September 2015 and August 2016 moved very slowly because of the conduct of the Union's lead negotiator, Joe Pozza. (Tr. 627:16-22). For example, at one point the Union unexpectedly left the negotiations without notifying Wyman. (Tr. 634-35). At other times, the Union abruptly ended sessions early and refused to negotiate between sessions. (Tr. 636:4-25). Grimaldi testified that the slow pace of negotiations was due to

Pozza's disorganized and inattentive behavior. By August 2016, the Union had replaced Joe Pozza with a new lead negotiator, Nathan Kilbert. Prior to Kilbert's arrival the parties had only four tentative agreements. After his arrival, the parties agreed to six additional tentative agreements. (Tr. 626:14-22).

Wyman's general practice was to give annual raises to employees in August. Importantly, however, Wyman used no set criteria or formula to determine the amount of the raises. (Tr. 549; 675-77; 681). In August 2016, Wyman exercised its discretion not to give employees a wage increase. On August 12, the Union demanded Wyman bargain over an appropriate wage increase for employees. While the Union disclaimed knowledge about the annual wage increases, (tr. 371:3-7), Callora, who had been in the bargaining unit for 24 years, testified that he was well aware Wyman generally gave raises in August. (Tr. 105-06). He said the Union did not request bargaining over the wage increases prior to August because he expected the employer just to hand out wage increases unilaterally (Tr. 109:8-10). On August 12, the Union announced its unhappiness that Wyman failed to give a discretionary wage increase and asked to bargain over the amount. (Tr. 673:15-21). The Union demanded an immediate 60 cent annual raise on top of a $1.00 raise for all employees. (Wyman Ex. 7, 63). From August to November, Wyman and the Union negotiated over the amount of the wage increase, agreeing that any raise would be retroactive to August. Berlew testified the lack of an August raise did not concern him because he knew any raise would be made retroactive to August. (Tr. 202:9-15). By November, the parties were still far apart, with the Union proposing a 58 cent increase, and the employer proposing a 15 cent increase. (Wyman Ex. 63).

2. Another alleged source of "taint" regards Wyman's maintenance of a "light duty" program, which allowed employees with medical restrictions to keep working by performing

other tasks at work. Wyman maintains a policy that states, "if there are no meaningful tasks available that the injured employee is capable of performing, the injured employee will be sent home subject to being called back should appropriate light duty become available." (Wyman Ex. 1; Tr. 114:18-22).

On October 14, 2016, Wyman told all five employees on light duty[3] not to report to work. It did this because it believed there were too many employees on light duty for the amount of work available. (Tr. 582:15-21). Wyman took this step without notifying the Union or offering to bargain (of course, the policy was preexisting and gave Wyman the right to send employees home). On October 16, the Union sent out a bargaining update that stated Wyman "unlawfully eliminated its light duty program last week without bargaining with the Union. We are filing unfair labor practice charges to reverse this change and reinstate the light duty program." (G.C. Ex. 6). On October 17, the Union wrote a letter to Wyman communicating the same. (Wyman Ex. 28). Soon after, the employees were told to report back to work. They were told they could continue on light duty at the facility and all the employees were made whole. (Tr. 605:3-20). Wyman wrote a letter to the Union essentially apologizing for sending those employees home—even though it was entitled to take this action under its written policy. (Wyman Ex. 29).

3. Since 2012, Wyman has maintained a confidentiality clause in its handbook, (tr. 217:24-25), which states: "Personal employee information, such as address, phone numbers, social security numbers, etc. is not to be discussed, copied, released, or provided to any other employee within the company." (Wyman Ex. 62). Since its inception, no employee ever mentioned the confidentiality statement to management or was punished for a violation. (Tr. 585:14-22).

[3] The employees on light duty were: Brian Collora, Byron Filipkoski, Foday Sillah, Dave Gretz, and Don Emerick.

B. Collection of the Decertification Petition

In October 2016, Bill Berlew began circulating a decertification petition. Berlew had longstanding and principled opposition to the Union; he was an open and public opponent of the Union during its organizing effort, often wearing an anti-union t-shirt to work. (Tr. 167:4-13).

Berlew, along with co-workers Josh Antosh and Mike Shovlin, collected employee signatures on the decertification petition. The petition unequivocally states that the employees wish to decertify the USW at Wyman and, that if over 50% of the employees sign, they request Wyman to withdraw recognition from the USW. (Wyman Ex. 2). While the language appears only on the first page of the petition, Berlew, Shovlin, and others testified that when they collected the petition, the first page of the petition was always present and that every employee read the petition and knew they were signing an anti-union petition. (Tr. 176:3-10; 782-83:25-23, 805-06, 818-20).

It is undisputed that the petition was created, circulated, and signed without any employer interference. Berlew collected several signatures in the break room, while Shovlin collected other signatures at his truck and at offsite locations (Tr. 175:21-22; 805-06, 818-20). Josh Antosh collected Kevin Foster's signature as well. (Tr. 774:6-7).[4] Based on that majority petition, the employer withdrew recognition from the Union in late November 2016.

[4] When questioned if he had anyone sign the petition, Antosh testified: "I got one individual I talked to that signed this paper" (Tr. 774:6-7). The transcript does not reference that Antosh was referring and gestured to Kevin Foster's signature on the last page of the petition. (Wyman Ex. 2). This makes sense because Foster's signature is the only one unaccounted for and was not testified to by other employees.

ARGUMENT

I. Wyman withdrew recognition on the basis of a valid majority petition.

A. Wyman was under no obligation to authenticate the petition because the General Counsel never challenged its validity, and the petition was properly authenticated at the hearing.

A precondition for a union serving as an exclusive bargaining representative is the existence of majority support for the union within the unit. *Auciello Iron Works, Inc. v. NLRB*, 518 U.S. 581, 785–86 (1996). This reflects "the Act's clear mandate to give effect to employees' free choice of bargaining representatives." *Levitz Furniture Co.*, 333 NLRB 717, 720 (2001); *Colo. Fire Sprinkler, Inc. v. NLRB*, ___ F.3d ___, No. 16-1261, 2018 WL 2749130, slip op. at *4 (D.C. Cir. June 8, 2018) ("under Section 9(a), the rule is that the employees pick the union; the union does not pick the employees.").

In *Levitz*, the Board held an employer may unilaterally withdraw recognition from a union if it can show actual, numerical loss of majority support for the union based on objective evidence. Anti-union statements signed by a majority of the employees constitute objective evidence of a loss of majority if the "basic thrust of the group message is the repudiation of the union as the bargaining representative." 333 NLRB at 725; *see also Indus. Waste Serv.*, 268 NLRB 1180, 1186 (1984) (holding that petition stating "We don't want the Union" sufficient to give employer a good-faith doubt as to union's majority status). Here, Wyman had unambiguous, objective evidence of the Union's loss of majority support. As of November 23, 2016, 23 of the 43 bargaining unit employees had signed a petition stating they did not support the Union and requesting a withdrawal of recognition.

The General Counsel contends that it is the employer's affirmative burden in a withdrawal of recognition case to present evidence that authenticates the petition. This position, however, is

based on a misreading of *Levitz*. In *Levitz*, the Board ruled that an employer may lawfully withdraw recognition from an incumbent union only if it can prove that the union has actually lost majority support. 333 NLRB at 725. An employer that withdraws recognition bears the initial burden of proving that the union suffered a valid, untainted numerical loss of its majority status. *Id.* The employer can establish this loss by a variety of objective means, including an anti-union petition signed by a majority of the unit employees. *Id.* Notably,

> [a]n employer who presents evidence that, at the time it withdrew recognition, the union had lost majority support should ordinarily prevail in an 8(a)(5) case if the General Counsel does not come forward with evidence rebutting the employer's evidence. If the General Counsel does present such evidence, then the burden remains on the employer to establish loss of majority support by a preponderance of the evidence.

Id. at 725 n.49.

The Complaint alleges no violation with regard to the "validity" of the employees' petition, or any malfeasance in preparing or presenting it to Wyman. Under a proper reading of *Levitz*, parties should not have to litigate issues that are not properly alleged in the complaint.

In any event, if authentication is required absent any General Counsel challenge to the petition's validity, this petition was validated at the hearing through uniform and uncontradicted employee and supervisor testimony. First, Tim Brink reviewed and recognized every employee's signature on the petition. (Tr. 525:15-21). While he reviewed the signatures in preparation for the trial, it is worth noting that Board law does not require an employer to authenticate a petition prior to withdrawing recognition. *See Flying Foods Grp., Inc.*, 345 NLRB 101, 103 n. 9, 103–04 (2005) (noting that an employer's withdrawal of recognition is not unlawful where the employer does not verify the authenticity of the signatures on a disaffection petition before withdrawing recognition). Brink testified that he is familiar with all of the employees' signatures because it is a small shop, and before testifying he reviewed the signatures and compared them to signatures

in the company records. (Tr. 525:15-21). He also receives a weekly report of employees who sign into training classes and sees every employee's signature weekly. (Tr. 524:7-18; 534).

Moreover, employee testimony overwhelmingly established the petition's authenticity. Berlew personally collected the signatures of Bukowski, Mikolosko, Brotzman, Cegelka, Garey Jr., Wallace, and Mewhort (who himself testified he signed the petition). (Tr. 149; 175:1-3). Buselli's signature was verified because Buselli delivered the signed petition to Antosh and Shovlin. (Tr. 773:19-21). The signatures of Kubasik, Harrison, Crispell, Lauer, Finch, Stout, and Turner were verified through the testimony of Shovlin, Crispell, and Finch. (Tr. 791; 782-83; 805-06; 818-20) Similarly, Shovlin verified the signatures of Petorak, Filipkowski, and Cook. (Tr. 805; 812).[5] Tim Ancherani's signature was verified by both Antosh (Tr. 775:1-8) and Stan Cegleka. (Tr. 827:1-7) (Ancherani told both that he signed the petition). Finally, Antosh collected Kevin Foster's signature. (Tr. 774:6-7).

The employees who testified in support of the petition gave consistent, credible testimony. While their testimony may have differed in some inconsequential respects, that enhanced their credibility because it shows they did not coordinate stories, but were attempting to give the most accurate, truthful version of events they could recall.

B. The petition was not ambiguous.

The General Counsel or Union may argue that Berlew's petition cannot be used to support a withdrawal because the language asking for a withdrawal only appeared on the first page (as well

[5] Nor can any adverse inference be drawn from Shovlin's testimony concerning why three of the signatures appeared on the third page of the petition (Tr. 819-20). Shovlin testified repeatedly that he always presented the entire cover with the statement to Filipkowski, Cook, and Petorak, and testified that he saw each of them sign the petition as well as read the front page. Shovlin simply stated he did not know why the employees skipped two lines on the second page, but stated it was likely because they wrongly thought it was full or because the second and third pages became shuffled at some point. (Tr. 820:2-7).

as the page Kevin Foster signed). However, a petition need not be unambiguous to be relied on for withdrawal. It simply has to reasonably show that, by the preponderance of the evidence, employees wanted to withdraw support from the union. *Wurtland Nursing & Rehab. Ctr.*, 351 NLRB 817 (2007). In *Wurtland*, the employees signed a petition that stated: "we . . . wish for a vote to remove the Union." *Id.* Based on that petition the Board held a withdrawal was proper. The Board found *Levitz* does not require the evidence proving loss of majority support to be "unambiguous." Rather, an employer must prove loss of majority support only by a preponderance of the evidence. This standard "simply requires the trier of fact to believe that the existence of a fact is more probable that its nonexistence." *Id.* at 818.

Neither is this case like *Highlands Regional Medical Center*, 447 NLRB 1404 (2006). There, a petition was too ambiguous to support a withdrawal because there was employee testimony that several of the employees believed the purpose of the petition was solely to obtain an election. *Id.* at 1406. In contrast, every employee who testified in this case (with the sole exception of Brotzman's unreliable version)[6] said he signed the petition (or presented the petition to other employees) with the first page of the petition present or attached to the succeeding pages. Moreover, every other employee who testified credibly about signing the petition reaffirmed they

[6] Steve Brotzman's testimony that he thought the petition was merely to call for a decertification vote should not be credited. Brotzman was an unreliable witness because he lied on the witness stand. When asked the reason for his termination, he claimed it was for "a quality issue." (Tr. 755:2). In reality, however, he was fired for falsifying inspection reports. (Tr. 763-64) (Wyman Ex. 68). Even when confronted with his earlier lie, Brotzman doubled down and claimed he was never told he was fired for falsifying reports and that he had never been delivered a termination letter. (Tr. 764:3-23). Tim Brink testified that while on the phone with Brotzman he went over the letter "line-by-line" with him. (Tr. 837:7-8). Moreover, Brotzman's testimony establishes that he *was told* that the petition's purpose was to get rid of the Union and was for a withdrawal. Brotzman admitted that Berlew told him the petition was going to be given to Wyman. (Tr. 757:6-10). In fact, Brotzman admitted he signed it precisely because it was going to be given to Wyman. (Tr. 758:18-20). Of course, the only reason to give the petition to Wyman would be to request a withdrawal of recognition.

did not want USW representation at that time. Simply put, the employees gave credible testimony that everyone who signed the petition knew precisely its purpose: to get rid of the Union.

II. The alleged ULPs had no effect on the employees' majority petition.

A. The standard for withdrawal of recognition

When an employer has evidence that a union no longer enjoys majority support, it is required to cease bargaining and may withdraw recognition. *Levitz*, 333 NLRB at 724; *Dura Art Stone*, 346 NLRB 149 (2005). A petition signed by a majority of employees establishes this as a matter of settled law. *Mathews Readymix, Inc. v. NLRB*, 165 F.3d 74 (D.C. Cir. 1999); *Shaws Supermarkets, Inc.*, 350 NLRB 585, 588 (2007).

Any claim that the employer tainted the petition requires serious misconduct that directly causes employee dissatisfaction with the union. *See St. Agnes Med. Ctr. v. NLRB*, 871 F.2d 137, 146-47 (D.C. Cir. 1989) (unfair labor practices must "significantly contribute to [the] loss of majority"); *Tenneco Auto., Inc. v. NLRB*, 716 F.3d 640, 643–44 (D.C. Cir. 2013); *Lee Lumber & Bldg. Material Corp.*, 322 NLRB 175, 177 (1996) ("there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support.").[7]

When determining whether a causal connection exists, the relevant factors are: (1) the length of time between the unfair labor practices and the union's loss of support; (2) nature of the alleged violations, including the possibility of lasting and detrimental effect on employees; (3)

[7] It is axiomatic that only *actual* unfair labor practices can taint a petition. *See Renal Care of Buffalo, Inc.*, 347 NLRB 1284, 1284, 1297 (2006). Here, Berlew contends and adopts Wyman's arguments that no unfair labor practices did, in fact, occur. But even assuming Wyman committed a minor or technical unfair labor practice, the facts and circumstances fail to establish any causal relationship with the employees' petition.

the tendency of alleged violations to cause employee disaffection with the Union; and (4) the effect of the unfair labor practices on employee morale organizational activities and union membership. *Master Slack Corp.*, 271 NLRB 78, 84 (1984).

B. The unfair labor practices were not the type that prohibited withdrawal of recognition under *Master Slack*.

1. The first *Master Slack* criterion is the time between the unfair labor practices and the loss of support. A causal connection exists when there is "close temporal proximity." Generally, that proximity is a matter of days or weeks. See, *e.g.*, *Bunting Bearings Corp.*, 349 NLRB 1070, 1072 (2007) (eight to 15 days temporal proximity); *RTP Co*., 334 NLRB 466, 468 (2001) ("close temporal proximity" when ULPs occurred two to six weeks before petition).

However, a long lapse of months between the petition and alleged unfair labor practices fails to support, and actually negates, a finding of close temporal proximity. *See, e.g., Garden Ridge Mgmt., Inc*., 347 NLRB 131, 134 (2006) (five months weighed against finding unfair labor practices caused employee sentiment against union); *Lexus of Concord, Inc.*, 343 NLRB 851, 852 (2004) (no temporal proximity when lapse was three months).

Here, the employer is accused of four main ULPs: (1) temporarily sending light duty employees home from work; (2) maintaining an illegal handbook; (3) failing to give raises in August 2016; and (4) illegally prolonging bargaining.

Maintaining an illegal handbook and failing to give raises were not in close temporal proximity. The failure to give raises in August occurred 2-3 months (70-90 days) before the petition was collected in October and November 2016. Moreover, the handbook provision had been maintained for nearly four years and had no tangible connection to current bargaining unit employees. Neither of these unfair labor practices could be called close in temporal proximity.

2. The second *Master Slack* criterion requires that the unfair labor practices be severe in nature and have a lasting detrimental effect such as discharge, withholding benefits, or threats. *JLL Rest., Inc.*, 347 NLRB 192, 193 (2006) (threatening employees with closure and job loss); *Beverly Health & Rehab. Servs., Inc.*, 346 NLRB 1319, 1328-29 (2006) (discharging active union supporter and unilaterally changing hours and vacation); *Goya Foods*, 347 NLRB 1118, 1121 (2006) ("hallmark violations that were highly coercive and likely to remain in the memories of employees for a long time"); *M&M Auto. Grp., Inc.*, 342 NLRB 1244, 1247 (2004) ("changes involved the important, bread-and-butter issues of wage increases and promotions"); and *Overnite Transp. Co.* 333 NLRB 1392, 1392 (2001) (employer committed "hallmark" violations).

The unfair labor practices alleged here are not remotely similar to the required hallmark violations.[8] The allegations that the employer temporarily sent home employees performing light duty work is a bare bones violation and could have no "lingering" adverse effect on the petitioners, especially given the fact they were quickly returned to work when the Union protested it as a unilateral change. *See Mathews Readymix*, 165 F.3d at 78 ("more than a bare-bones violation . . . is needed to support the inference that the employer's unlawful conduct may have influenced the employees to sign a petition"). Indeed, there is no evidence that most Wyman employees even knew that the employees on light duty were being sent home when they signed the petition. (Tr. 178-79) (Wyman Ex. 2) (16 signatures were obtained before the light-duty issue could even become widely known). In evaluating causation, the Board holds that

[8] Moreover, the charges that Wyman refused to provide information during bargaining is completely unrelated to the withdrawal of recognition. *Howe K. Sipes Co.*, 319 NLRB 30, 40 (1995) ("no reason to believe that the type of [unfair labor practices] found here, primarily the failure to provide the union with certain information, could or would tend to cause disaffection with the Union"); *Tenneco*, 716 F.3d at 643–44 (employer's denial of an information request not a cause of the petition).

unfair labor practices limited in scope (impacting only a few employees), lacking "specific proof," or not widely known among employees are insufficient to rise to the level of hallmark violations. *Champion Enter., Inc.*, 350 NLRB 788, 792 (2007) (holding that ULPs were "isolated and/or unknown by most employees" and could not taint a withdrawal petition). For example, in *Champion*, the Board held that one-day layoffs were an "isolated and brief" event that would not have a "lasting and detrimental" effect on employees and diminish support for the union. *Id.* Similarly here, the employees on light duty were quickly returned to work after the Union intervened. Such responsive action likely made the Union look stronger, not weaker.

Similarly, Wyman's handbook provision was not new, having been in place since 2012. (Tr. 217:24-25), nor did it appear to have a severe—let alone any—effect on employees' views about the Union. *Holiday Inn*, 284 NLRB 916, 916 (1987) (challenged rules were not new or different from previous rules and employer lawfully withdrew recognition). Here, despite the challenged rule, employees freely exchanged contact information and the Union collected email addresses to contact them. (Tr. 778:4-9).

Certainly, while withholding a raise can be framed in some circumstances as "withholding benefits," granting a raise would have been a double-edged sword for Wyman. If Wyman had granted a raise the Union certainly could have filed an unfair labor practice charge alleging Wyman's "direct dealing" with its employees. Withdrawal petitions are sometimes considered tainted when employers institute unilateral raises or other changes to core terms and conditions of employment. *M&M Auto.*, 342 NLRB at 1244 (withdrawal of recognition illegal because employer unilaterally raised pay); *Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2003) (noting the possibility that a unilateral change in health benefits may prevent decertification election after *Master Slack* analysis); *In re Penn Tank Lines, Inc.*, 336 NLRB 1066, 1067 (2001)

(unilateral wage reduction showed that "union is irrelevant" and undermined support for the union); *see also NLRB v. Katz*, 369 U.S. 736, 743-44 (1962) (holding that employer's persistence in giving discretionary merit wage increases violated its good faith bargaining obligation).

Further, no claim that Wyman was engaging in any type of improper bargaining could taint the petition. Such a claim must show employer bargaining such as was present in *Prentice-Hall, Inc.*, 290 NLRB 646 (1988). There, the Board found the employer engaged in egregious bad faith bargaining over the course of 11 months and 21 sessions. *Id.* at 669-73. The employer demanded a broad management rights clause and a no strike clause, while refusing to agree to an effective grievance and arbitration procedure, all which would have had the effect of stripping the union of any effective method of representing the unit. *Id.* at 669-71. Here, Wyman is not insisting on unilateral control over virtually all significant terms of employment, which would leave the Union and employees with few rights or protections. There no evidence to suggest that its bargaining tactics caused the employees to collect the petition.[9]

3. The third and fourth *Master Slack* criteria ask whether the alleged unfair labor practices had a tendency to cause union disaffection and its effect on employee morale. Here, there is no evidence that Wyman caused disaffection tied to the petition.

First, even prior to the unfair labor practices, support for the Union was weak. Uncontradicted testimony reveals that the plant was significantly divided among pro and anti-

[9] On this point, the General Counsel cannot rely on Steve Bukowski's alleged text message as proof that employees were dissatisfied with the length of bargaining. (G.C. Ex. 6). The General Counsel claimed Bukowski would appear and testify to authenticate and explain his message, (tr. 75:17-19), but neither the General Counsel nor Union put Bukowski on the stand. This is likely because Bukowski was against the Union, one of the first employees to sign the petition, and one of the employees who Berlew also trusted with transporting the petition. (Tr. 195:7-10). The texts are also missing the rest of the conversation which would give important context to the alleged remarks from Bukowski. Without knowing what prompted these remarks they are too vague, isolated, and self-serving to be credited as evidence against the petition.

Union factions. The Union won the certification election in 2014 on a 24-22 vote. In October 2015, only 12 employees showed up to the initial meeting. The Union did not hold a follow-up meeting for another year and went nearly 11 months without communicating the status of bargaining to its members. Even after the Union started sending bargaining updates in August 2016, there is scant evidence the Union did anything to engage the employees other than send occasional updates via email. Callora admitted the unit was always divided and that, for example, employees on the third-shift had a longstanding dislike for the Union. (Tr. 102:3-11). As a matter of admissibility of relevant evidence, if prior evidence of no dissatisfaction can be introduced and relied upon to support a bargaining order, *see Bunting Bearings*, 349 NLRB at 1070 (causal connection established by lack of prior evidence of disaffection), evidence of prior disaffection can be properly credited on this record as well.

Second, the employees testified the putative unfair labor practices had no effect on their desire to keep or discard the Union. Berlew testified without hesitation that he had longstanding opposition to unions in general and opposed both the USW and another union that attempted to organize the facility. (Tr. 166-67). Similarly, Antosh testified he voted against representation in both elections at the facility. (Tr. 775-76). He also testified nothing he knew about the bargaining sessions affected his decision to collect and sign the petition. (Tr. 779:1-15). Finch testified that "basically everyone on the third shift didn't want the union" (tr. 783:16-17) and these feelings were present "basically from the whole start." (Tr. 783:23). He also testified that nothing he knew concerning the negotiations affected his decision to sign the petition. (Tr. 786:4-6). Crispell was hired after the Union was certified (tr. 792:17-19), but he credibly testified that nothing Wyman did affected his decision to sign the petition. (Tr. 794-96). Importantly, he testified Wyman's discretionary decision not to give a raise in August 2016 had no effect on how

he felt about the Union because he already received a raise when he was hired at Wyman and he felt he was already "making a lot" of money. (Tr. 797:6-9). Cegelka testified he was generally against unions because he had prior negative experiences in other jobs where he was exclusively represented. (Tr. 827:16-18). He also testified that he never read the bargaining updates from the Union (tr. 828:9-10) and that nothing that was happening in negotiations affected his decision to sign the petition. (Tr. 828:15-22).

Neither does Mewhort's testimony change the result. Mewhort testified that he did not like Wyman's proposal of a 15 cent raise and that he signed the petition because he felt like he was not better off with the Union. (Tr. 150:1-5). Mewhort, however, was previously opposed to the Union and testified during a prior objections hearing he felt the union bullied and misinformed him (tr. 511:17-24) so any later dissatisfaction with the Union was simply a continuation of how he had felt since certification. Moreover, there is no credible evidence that any other petition signer expressed any frustration with the employer's 15 cent wage proposal. As others noted, employees knew any raise would be retroactive to August and understood that the topic was under bargaining with the Union. (Tr. 202:9-15). Of course, his testimony on this is beside the point because the failure to give a completely discretionary raise is not an unfair labor practice. See *infra*, p.2-3.

Lastly, the under-oath testimony of the petition signers is highly relevant, and the Board has credited this kind of testimony.[10] For example, both the ALJ and the Board in *Master*

[10] The General Counsel has protested throughout this proceeding that testimony about the effect of unfair labor practices is inadmissible because *Master Slack* is an objective standard. Not so. The Board has noted that only the first three *Master Slack* factors are objective. *See Overnite Transp.*, 333 NLRB at 1397 n.22 (noting the fourth factor of *Master Slack* is subjective). The testimony of how any alleged unfair labor practices actually affected employees is essential to the fourth factor. While the Board has ruled evidence of the actual impact of the alleged unfair labor practices is not required to make a finding of a tainted petition, *see id.*, it cannot blithely

Slack relied on testimony of petition signers that the employer's conduct did not affect their decision to sign. The ALJ in *Master Slack* concluded there was no evidence of a causal relationship. The Board affirmed, stating: "we find no basis to disturb the judge's reliance on the unambiguous testimony of the petition's signers that the matters raised in the prior and pending Board litigation had no impact whatsoever on their signing of the petition." 271 NLRB at 78, n.1. *See also Renal Care of Buffalo, Inc.*, 347 NLRB 1284, 1296-97 (2006) (employees testified employer's conduct in no way impacted their decision, and Board did not present evidence that unfair labor practices caused union's lost support); *Tenneco*, 716 F.3d at 651 (noting "it is noteworthy that the ALJ heard and credited testimony from nine of the petition-signing employees" that nothing the company did influenced their decision).

Here, Berlew, Antosh, Finch, Cegelka, and Cripell all credibly testified their signature on the petition had nothing to do with the alleged unfair labor practices. These employees have had a longstanding, principled opposition to the Union, as is their Section 7 right, thus there can never be a causal nexus between Wyman's alleged acts and their opposition. Even assuming, *arguendo*, that Wyman actually committed violations alleged in unfair labor practice charges, "[t]he wrongs of the parent should not be visited on the children, and the violations of [the employer] should not be visited on these employees." *Overnite Transp.*, 333 NLRB at 1398 (Member Hurtgen, dissenting).

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ignore a situation such as this where the preponderance of the evidence establishes there was no effect. *Cf. K-Mart Corp. v. NLRB*, 62 F.3d 209 (7th Cir. 1996) (Board improperly ignored employee testimony about effect of union coercion).

CONCLUSION

The Complaint should be dismissed, or alternatively, if Wyman is found to have committed unfair labor practices there should be a finding that the petition is still valid.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Post Hearing Brief were filed electronically with the Division of Judges through the NLRB's e-filing system, and copies were sent to the following additional parties via e-mail as noted:

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